

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MANUFACTURERS AND TRADERS TRUST	:	
COMPANY	:	DETERMINATION
	:	DTA NO. 818657
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 1, 1991 through November 30,	:	
1999.	:	

Petitioner, Manufacturers and Traders Trust Company, One M & T Plaza, Buffalo, New York 14240, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1991 through November 30, 1999.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 77 Broadway, Suite 112, Buffalo, New York, on April 8, 2002 at 9:30 A.M., with all briefs to be submitted by August 28, 2002, which date began the six-month period for the issuance of this determination (this period was extended to nine months pursuant to Tax Law § 2010[3]). Petitioner appeared by Ernst & Young LLP (David E. Werth and Brendan McCafferty, CPAs). The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer A. Murphy and James Della Porta, Esqs., of counsel).

On February 12, 2003, the matter was reassigned to Brian L. Friedman, Administrative Law Judge.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund of sales and use taxes paid on the purchase and installation of automated teller machines ("ATMs") on the basis that such purchase and installation of the ATMs did not constitute a capital improvement

FINDINGS OF FACT

1. Petitioner, Manufacturers and Traders Trust Company ("M & T Bank"), is a banking corporation incorporated under the laws of the State of New York. M & T Bank's primary business is commercial and retail banking; it has branch offices throughout New York State.

2. On February 17, 2000, M & T Bank filed an application for credit or refund seeking a refund of sales and use taxes paid for the purchase and installation of ATM machines in the amount of \$356,743.00 for the period September 1, 1991 through November 30, 1999. A letter attached to the application indicated that the basis for the claim was that the ATM machines were capital improvements pursuant to Tax Law § 1101(b)(9) and, in addition, that the claim was based upon discussions with Barbara Wood of the Field Audit Management Group of the Division of Taxation ("Division"). An audit of M & T Bank had been conducted by the Division prior to filing of the application for credit or refund.

3. On March 28, 2000, the Division denied, in full, petitioner's refund claim. The denial letter stated, in pertinent part, as follows:

Claim for refund for the installation of ATM machines which you consider a capital improvement to real property are considered taxable. It is our position that by law, ATM machines must be removed by the owner when they leave a location. Therefore, they cannot be considered a permanent installation. This claim for refund is therefore being disallowed in full.

4. M & T Bank recorded the purchase of these ATM machines in a computer hardware account which is a personal property account despite the fact that it maintains accounts for leasehold improvements and other real property classifications. The Division's auditor acknowledged that while he would inquire during an audit as to how a particular item was classified by a taxpayer on its books, i.e., whether it was recorded in a capital improvement account or in a repair and maintenance account, the item would be allowed as a capital improvement by the auditor if so warranted, regardless of the taxpayer's categorization of it in its books and records.

5. The ATM machines were purchased from and installed by Diebold, Inc. ("Diebold"). As part of the audit of M & T Bank's refund claim, the Division reviewed invoices from Diebold, a sample of standard installation agreements between Diebold and M & T Bank and M & T Bank's accounting records for its purchases of the ATM machines.

Attached to M & T Bank's petition was a sampling of 15 invoices from Diebold to the bank during the period at issue herein for installation of certain ATM machines. The contract price for each installation was between \$27,000.00 and \$29,000.00, exclusive of sales tax.

Diebold used a standard form agreement for the furnishing and installing of each ATM. This same agreement was used for all ATMs purchased by M & T Bank during the period at issue. The agreement stated, in part, that the "[p]urchaser agrees to buy and the Seller agrees to furnish to the Purchaser the following tangible personal property hereinafter described." The agreement also contained 17 "Additional Conditions."

Paragraph "2", entitled "INSTALLATION" stated, in part, as follows:

Purchaser shall provide without cost to Seller suitable foundations, shoring of floors, grouting around equipment, welding of equipment to reinforcing rods where required, surrounding masonry and concrete work, and necessary building openings prepared in accordance with drawings

furnished to the Purchaser by the Seller, to receive equipment furnished by Seller.

Paragraph "3", entitled "TAXES" provided as follows:

No Federal, State or Local sales, use, excise or other tax based on the sale or purchase of materials under this agreement is included in the contract price. Any such tax must be paid by the Purchaser, and if by law the Seller is liable for the collection or payment thereof, the same shall be added as tax to the contract price and the Purchaser agrees to reimburse the Seller for such tax. It is understood and agreed that the Seller is acting as a vendor of personal property, and not as a construction contractor, and it is the intention of both parties that such sale and installation does not constitute an improvement to realty. Purchaser agrees that a certificate of capital improvement shall not serve to exempt such Purchaser from liability for such tax.

6. During the course of the audit of M & T Bank's refund claim, the Division's auditor had several discussions with Richard Harpster, Diebold's Director of Taxes. The initial discussion occurred on March 7, 2002. Mr. Harpster stated that the ATM machines do not require much installation. He indicated that telephone hookups are provided and an electrical outlet box is also provided. The installer connects the phone line and plugs the ATM into the electrical outlet. Mr. Harpster stated that the ATMs can be installed and removed with little or no damage to the property. Through-the-wall models are slid into place through an opening through the back of the wall. In some cases, a machine is installed into an existing window or door location; however, in such circumstances, it is often necessary to break out a wall or build a new wall to accommodate the footprint of the ATM. The ATM may be bolted to the floor, but it is often not required. The machines have four adjustable legs which serve to level the ATMs on a finished floor. The electrical cord is plugged into a conventional wall socket; it is not hard wired into the building's electrical system. A facia plate is screwed to the front of the ATM.

On March 11, 2002, the auditor received a fax from Mr. Harpster which explained how Diebold's ATM machines were installed. This explanation stated:

- ATMs require minimal installation. Some are bolted to the floor but bolting is not required. Others are inserted through openings in walls and are clamped to secure them. Island ATM's are bolted to concrete, but can be removed by simply unbolting them.
- The installer hooks up the ATM to a phone line, electric line and verifies the unit is functioning properly before leaving the site.
- The ATM can be removed with little or no damage to the existing real property.
- The ATM is a self contained unit. Accessibility to the unit results in no damage to the real property.

After receiving the fax, the auditor again spoke with Richard Harpster about the software that goes into an ATM machine. Mr. Harpster stated that the software was basically the same for all financial institutions and that only very slight modifications were needed to the software for a specific location. Mr. Harpster sent to the auditor diagrams showing the installation of the various types of ATM machines. After receiving the diagrams, the auditor telephoned Richard Harpster to inquire about the useful life of ATMs. He was informed that, typically, they can last a long time but may be replaced when a "new generation comes out." Because today's models are modular, if a part malfunctions, that part is replaced.

Mr. Harpster stated that to his knowledge, ATMs are not left at a location when a bank or financial institution leaves such location. He indicated that it is probably less costly to remove an ATM and take it to a new location. When the auditor asked him how he knew this, Mr. Harpster sent him an e-mail which stated that Diebold maintains an equipment file which provides the company with a significant amount of detailed information about the equipment that is under a maintenance contract. One such item of information is the equipment's physical location. When a financial institution closes or otherwise wants a piece of equipment removed,

the equipment file is updated with that information. If the equipment is reinstalled in a new location, the equipment file will indicate the new location.

7. A purchaser of an ATM machine can obtain a credit if an old ATM machine is traded in. On the sample invoice in evidence (Division's Exhibit "G"), a charge was imposed for de-installing an ATM machine and installing a Diebold Model 1072I.

8. Diebold, like other manufacturers of full-service ATM machines, had, in recent years, been selling fewer newly manufactured machines which has reflected a focus on technology to upgrade existing machines instead of selling new ones. In an attempt to increase its market share, Diebold has focused on upgrading machines through enhanced technology.

In mid-1980, Diebold developed the first ATM using simple, plug-in modules which allow Diebold's technicians to upgrade a unit quickly and easily. An upgrade of an Interbold i series ATM takes less than a day and costs less than half that of a replacement. During an upgrade, electronic and mechanical components are exchanged for those with the latest technologies. The original installation and ATM chest remain intact.

9. There are 71 ATM machines which are at issue in this proceeding. They are Diebold models in the 1070 and 1060 series which are classified as either "drive-up" or "walk-up" units.¹ Walk-up units are usually installed in an interior wall of the structure (such as a vestibule wall) while drive-up units are normally installed in an exterior wall. The ATM models installed in most of the locations are the 1072i and 1073i models. Both are "through-the-wall" models, i.e., by design they are inserted into a wall rather than being freestanding.

¹ There are drive-up and walk-up units in both the 1070 and 1060 series of Diebold ATMs.

Of the 71 ATM machines at issue, 19 were located in buildings which were owned by M & T Bank; the remaining 52 ATMs were located in buildings which were leased by M & T Bank.

In evidence, as Division's Exhibit "E", are the 43 leases for the premises at which the 52 ATM machines were installed.² With the exception of lease nos. "27", "36", "39", "40" and "43", each of these leases contains language which, at the time of the expiration of the lease or upon surrender of the premises for other reasons, provides: (1) Tenant may or is required to remove trade fixtures or bank equipment (the leases require tenant to restore premises to original condition or be responsible for damage thereto); (2) Landlord/lessor has the option to require tenant to remove such fixtures or equipment; or (3) Such fixtures or equipment are defaulted to the landlord/lessor if not removed by the tenant.

Lease no. 27 provides that at the expiration of the lease, the fixtures or equipment become part of the real estate and the sole property of the landlord. Lease no. 36 contains no language which addresses the issue of removal of fixtures or property installed by the tenant during the term of the lease. Lease no. 39 states that the fixtures or equipment shall become the property of the landlord unless the landlord elects otherwise, in which case the tenant shall then be required to remove the same. Lease no. 40 provides that the fixtures or equipment shall remain the property of the tenant for the term of the lease and then shall become the property of the landlord upon expiration of the term thereof. Lease no. 43, applicable to two ATM machines, provides that the fixtures or equipment become the property of the landlord at the expiration of the lease.

² Lease numbers "1", "2", "12", "13", "15", "17", "23", "36" and "43" refer to premises leased by M & T Bank at which two ATM machines were installed.

10. John Kackmann is employed by M & T Bank as Assistant Vice President of Electronic Banking. His responsibilities include the procurement of ATMs and the coordination of the installation of the ATMs at M & T Bank's facilities.

M & T Bank rarely transfers or reuses an ATM machine after its original installation. During the period at issue, any ATM replacements typically involved replacing an IBM machine, which was no longer in production, with a Diebold machine. Because IBM machines had different design specifications (specifically relating to the thickness of the wall into which the machine was installed), extensive modification to the site or selection of a new site was often required to accommodate a Diebold ATM machine. Through 1999, approximately 90 percent of replacements which occurred were for IBM equipment that had different footprints and different wall requirements.

Formerly, ATMs were hard wired, and accordingly, replacements made during the 1990s required modification of the electrical system from such a set up to a more simplified plug-in set up.

Diebold's Model 1073, used by M & T Bank in a through-the-wall drive-up application, requires that the wall within which it is installed be no more than three to four inches in thickness, including any surrounding studs, drywall and decorative enclosures. The majority of walls in which drive-up machines are installed are at least four inches in thickness which necessitates that an entire section of the wall be removed and a new thinner wall be installed. M & T Bank has an arrangement with Diebold wherein the bank pays higher installation fees in exchange for Diebold taking on more responsibility in the installation process. Such additional responsibilities could include running the electric, wiring modifications, connecting data lines

and modifying the wall openings. At times, Diebold would handle the wall modifications through a subcontractor.

Some locations receive reinforced walls to house the ATMs rather than just drywall. On some occasions, there is a need to correct elevation differences between the interior floors and the exterior driveway in order for drive-up ATMs to accommodate motor vehicles.

Once in place, ATMs are sealed with caulking and trim and often require insulation to complete the installation. Removal of an ATM necessitates the repair of a hole in a wall and often causes new damage to the wall or other surrounding structures. Sometimes the wall surrounding the ATM must be cut or broken through in order for the ATM to be removed forward. In these cases, additional wall repairs are required.

11. Gary Siuda is employed by M & T Bank as Vice President of Construction and Space Planning. His responsibilities include the planning, management and coordination of construction services for all M & T Bank facilities including the coordination and planning of all ATM installations.

ATM installation is an integrated process which requires extensive planning and the coordination and deployment of varied resources, often including architects, electricians, construction contractors (drywallers, masons and carpenters) and Diebold technicians. To accomplish these installations requires extensive construction work as well as a significant dollar investment.

The installation of a drive-up ATM requires the creation of an opening in an exterior wall, internal cabinetry, modification to any system contained in the affected wall (i.e., radiant heat systems), construction of structures to separate the rear of the ATM from the branch, correction for elevation differences between the interior and exterior of the building and certain other tasks

which vary with each installation. In some instances, a drive-up ATM will be installed in a manner that utilizes a portion of the pre-existing drive-up teller window; however, substantial modification to the existing opening is necessary to facilitate the installation of the ATM.

The installation of a walk-up ATM requires the construction of a vestibule room to house the ATM, thereby requiring modification to the facility's heating system, phone lines, security and electrical system as well as entrance modifications.

Construction is required for every ATM installation regardless of whether the ATM machine is an original or a replacement. The circumstances and requirements involved in installing an ATM vary with each project. No two ATM installations are ever the same. Diebold is capable of controlling as much of the installation process as a customer is willing to permit. The extent of services provided by Diebold on behalf of M & T Bank varies with each installation. Such services may include site evaluations, managing implementation and physical preparation of the site. Site preparation services available from Diebold include creating wall openings, performing electrical work, kiosk and canopy construction, HVAC (heating, ventilation and air conditioning), masonry and certain other specialized construction functions.

The circumstance under which a transfer of ATMs is most likely to arise is where two M & T Bank branches are being consolidated. In such a situation, a drive-up ATM would be transferred to a location which does not have a drive-up ATM. In that case, all of the preparation which goes into a new installation must be done.

12. Diebold prepared a brochure on installation and implementation solutions which set forth the site preparation tasks required for Diebold equipment and systems installation. These tasks include: wall openings; modular construction; signage/surround construction; kiosk and canopy construction; culverts, trenching and tubing; concrete islands and drive-ups;

encasements; site modifications; conduit or PVC tubing installation; high/low voltage cabling and wire pulling; and cable and tubing specification and supply. In the brochure, Diebold also listed its available services as: electrical; paving; rigging; plumbing; tele/data communications; earthwork; concrete; masonry; plaster and drywall; HVAC; glazing and glass; steel; painting; and roofing.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioner contends:

a. The Division did not provide a valid basis for denying the refund claim. Although, the Division stated that there was a law which required that ATM machines be removed when a bank or financial institution leaves a location, petitioner asserts that no such law exists.

b. M & T Bank's ATM machines substantially add value to the real property to which they are attached.

c. The ATM machines installed at M & T Bank's branch locations become part of the real property and are designed and manufactured to be permanently affixed to the property.

d. M & T Bank intended the ATM installations to be permanent attachments to the real property.

e. The provisions set forth in Diebold's standard form agreement which stated that the ATMs were installations of tangible personal property were self-serving since, if found to be capital improvements, Diebold would be liable for payment of sales and use tax on materials comprising the ATM installation.

f. The Division erred in relying on M & T Bank's internal accounting treatment of ATM machines for book or income tax purposes. Petitioner charged the ATM installations to a personal property account rather than a real property account. During the period at issue, petitioner capitalized ATM installations as fixed assets, charging them to an account entitled "Computer Hardware." While serving numerous internal accounting purposes, this was totally unrelated to sales tax. Accounting treatment for book purposes does not reflect intent as to permanency of the installations.

14. In response, the Division asserts as follows:

- a. ATM machines do not substantially add to the value of the real property or appreciably prolong the useful life of the property.
- b. ATM machines do not become part of the real property; they retain their identity as tangible personal property after installation.
- c. The ATMs are not permanently affixed to the real property such that removal would cause material damage to the property or the ATM itself.
- d. The ATMs were not intended to become permanent installations. In some of its leases, M & T Bank has obligated itself to remove the ATM machines upon demand by the landlord.
- e. Petitioner's own treatment of the ATMs in its books and records supports the conclusion that they were a fixed asset. Although it has accounts for leasehold improvements and real property, petitioner made a deliberate decision not to include ATMs in these accounts.
- f. Diebold's decision not to accept a capital improvement certificate upon its sales of ATM machines to petitioner is the result of extensive expertise in installing the machines.

Diebold has a significant incentive to properly interpret the law with respect to capital improvements. If Diebold is incorrect and the ATMs are deemed to be capital improvements, it would be liable for a significant sales tax liability, i.e., it would owe tax on its purchase of materials which go into the production and installation of the ATM machines.

g. Among the items billed by Diebold to M & T Bank are charges for software.

Pursuant to Tax Law § 1101(b)(6), the sale of pre-written software is taxable. Diebold also charges for protective services which, pursuant to Tax Law § 1105(c)(8) are subject to tax.

CONCLUSIONS OF LAW

A. Petitioner contends that the Division did not provide a valid basis for denying its refund claim in that the denial letter from the Division erroneously stated that there was a law which required that ATM machines be removed when a bank or financial institution leaves a location when no such law exists. While petitioner is correct in its assertion that there is no law requiring removal of ATM machines, it must be noted that there is no provision in the Tax Law which requires that the Division provide a valid basis for denying a claim for refund of sales or use tax. Tax Law § 1139(b) requires only that the Division notify an applicant for a refund or credit of tax, by mail, within six months of receipt of such application.

B. Tax Law § 1105(c)(3) imposes a sales tax on the installation of tangible personal property not held for sale in the regular course of business. Tax Law § 1105(c)(3)(iii) provides an exception to this general rule:

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital

improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter.

C. Tax Law § 1101(b)(9)(i) defines the term “capital improvement” as “[a]n addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

Each of these criterion for determining whether an addition or alteration is a capital improvement shall be considered separately.

D. The first criterion for qualification as a capital improvement is that the addition or alteration must substantially add value to the property or appreciably prolong the useful life of the property. Clearly, while an ATM machine does not prolong the useful life of the property, it may substantially add to the value of the property. In its brief, the Division contends that a building with an ATM machine would be of value only to a bank and would probably be less attractive to prospective purchasers who are not in the banking business. This position is without merit.

The Division’s Publication 862, Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property, sets forth a listing of what it considers a nontaxable capital improvement as opposed to a taxable repair, maintenance or installation. Included in the list of capital improvements are awnings, fences, solar heating systems and in-ground swimming pools. While it could be argued that prospective purchasers might not need or want such “improvements,” they have, nevertheless, been held to be nontaxable capital improvements. A

free-standing outside freezer box (*see, Matter of Dairy Barn Stores, Inc.*, Tax Appeals Tribunal, October 5, 1989) which clearly would have limited appeal to those other than a dairy, grocery or convenience store was held to be a capital improvement. In this case, as well as in others (*see, Matter of Emery Air Freight Corp.*, Tax Appeals Tribunal, October 17, 1991; *Matter of Gem Stores, Inc.*, Tax Appeals Tribunal, October 14, 1988), the Tribunal indicated that if the purchase and installation costs were substantial, i.e., in excess of several thousand dollars, the equipment substantially added to the value of the property. Accordingly, based upon memoranda of agreement from Diebold which indicated that the purchase price of an ATM, exclusive of installation, exceeded \$25,000.00, it is hereby found that such ATM machines substantially added to the value of the real property.

E. The second criterion is that the addition or alteration becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or to the article (the ATM machine) itself. In its brief, the Division contends that the ATM machines retain their identity as tangible personal property after installation and, therefore, do not become part of the building. While it is true that, unlike items such as siding or building additions such as decks, porches and garages, ATM machines do not become an integral part of the realty, the fact that the ATM machines retain their identity as tangible personal property does not bar a finding that they may be considered to be a capital improvement. Certainly items such as built-in dishwashers and ovens, attic fans and smoke detectors retain their identity as tangible personal property; however, if they become a part of the real property or are permanently affixed such that removal would cause material damage to the property or article itself, the Division considers such items to be capital improvements (*see*, Publication 862, Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property).

Therefore, if it is determined that the ATM machines were permanently affixed to the real property such that their removal would cause material damage to the machines to the property or to the ATM, such machines may, nevertheless, be found to be a capital improvement.

In the present matter, the seller of the ATM machines, Diebold, clearly opposes a finding that the ATM machines constitute a capital improvement.³ This is evidenced both by the language of paragraph “3” of Diebold’s standard form agreement and also by the content of the communications from Diebold’s Director of Taxes, Richard Harpster, to the Division’s auditor wherein he stated, among other things, that the ATMs require minimal installation and can be removed with little or no damage to the *existing* real property. However, “existing” is the key word here since extensive preparatory work is required before an ATM can be installed, and pursuant to the terms of the standard form agreement, this preparatory work is to be performed by the purchaser (M & T Bank) prior to the installation by Diebold. Once this work is performed, the actual installation of the machine is apparently quite simple and routine. But, as noted by John Kackmann (M & T Bank’s Assistant Vice President of Electronic Banking) and Gary Siuda (M & T Bank’s Vice President of Construction and Space Planning), the work done to prepare a particular bank branch for the installation of an ATM machine often requires extensive construction work at a significant cost to M & T Bank. The installation of a drive-up ATM requires creation of an opening in an exterior wall or modification of an existing opening as well as other construction work related thereto. Installation of a walk-up ATM requires

³ As previously noted, a finding that the ATM machine constitutes a capital improvement would necessitate Diebold’s paying sales and use taxes on its purchases of materials comprising the ATM installation. As petitioner, in its brief, correctly notes, these taxes would be an additional cost of doing business which: (a) would have to be absorbed by Diebold, thereby affecting its profitability, or (b) be passed on to its customers in the form of higher prices. In addition, treating all of its sales as sales of tangible personal property rather than as capital improvements simplifies Diebold’s tax compliance by eliminating the need for Diebold’s employees to determine the correct sales tax treatment for its sales throughout the multiple jurisdictions (with varying tax laws) where its sales are made.

construction of a vestibule room to house the ATM with resulting modification to the building's heating system, phone lines, entrance and security and electrical systems. In his communications to the auditor, Mr. Harpster's failure to mention the site evaluations and physical preparation which is required before an ATM can be installed is especially noteworthy in light of the fact that Diebold or a subcontractor employed by Diebold has handled most of this preparatory work in exchange for payment of a higher installation fee by M & T Bank.

It is, therefore, apparent from a review of the physical preparation and construction work required prior to installation that despite the relative ease of installation of the ATM after this work is completed, these ATM machines do become part of the real property.

The Division, as part of its argument that ATMs are not intended to be permanently installed, points out that ATM machines are plugged into an electric socket rather than hard wired into the building's electrical system. While that is currently true, many ATMs were formerly hard wired. Electric garage door openers and controls which are classified by the Division as capital improvements (*see*, Publication 862, p.15) are sometimes hard wired, but are often designed to be plugged into an electrical outlet.

In *Matter of C & L Systems, Inc.* (Tax Appeals Tribunal, August 11, 1994), that taxpayer was assessed additional sales tax for failure to pay the tax on its purchases of materials used in its installation of "through-the-wall" air conditioning units. Since a contractor who makes a capital improvement must pay a tax on the cost of materials to him (*see*, 20 NYCRR 527.7[b][5]), it is clear that there was no dispute by the Division in this case that these "through-the-wall" air conditioning units were capital improvements. Certainly, the installation of these ATMs, which are also "through-the-wall" installations, is more complicated and costly than the

installation of air conditioning units which have been held to be capital improvements based upon the manner in which they are affixed to the property.

The ATMs at issue in this proceeding, whether “drive-up” or “walk-up” models are “through-the-wall” types and require the kind of preparatory construction work previously discussed. Because installation of the ATM machines requires the breaking of a wall or, in some cases, construction of a vestibule room with the requisite building modifications for each, it must be found that the machines become part of the realty or, in the alternative, are permanently attached to the real property so that removal would cause material damage to the property. Accordingly, the ATMs meet the second criterion for capital improvement status.

F. The third criterion for a finding that an addition or alteration is a capital improvement is that such addition or alteration is intended to become a permanent installation. It is at this juncture where the issue of the lease language for those ATM machines which were installed in premises leased by M & T Bank must be addressed since it is a well-settled principle that installations made for the purpose of conducting the business of one who is not the owner of the property (e.g., a tenant, licensee or franchisee) are presumed not to be permanent, but made for the sole use and enjoyment of the person who owns the business and not for the purpose of the landlord’s estate (*Matter of Flah’s of Syracuse v. Tully*, 89 AD2d 729, 453 NYS2d 855). As the Tax Appeals Tribunal noted, in *Matter of Empire Vision Center, Inc.* (Tax Appeals Tribunal, November 7, 1991):

Moreover, when a lessee or licensee of property reserves the right to remove the installed property, ‘a finding of permanency is unlikely’ (*Matter of Glenville Cablesystems Corp. v. State Tax Commn.*, 142 AD2d 851, 531 NYS2d 137, 138, *citing Matter of Merit Oil of New York v. New York State Tax Commn.*, 124 AD2d 326, 508 NYS2d 107). Where the licensee had actually obligated itself to remove the improvement upon demand, the evidence is even stronger ‘of intention that the improvement be other than permanent’ (*Matter of Manhattan*

Cable Tel. v. New York State Tax Commn., 137 AD2d 925, 524 NYS2d 889, *lv denied* 72 NY2d 808, 534 NYS2d 666).

In a memorandum of the Division's Technical Services Bureau, Taxpayer Services Division, the issue of intended permanence with respect to trade fixtures was addressed as follows:

The question of the intended permanence of installations by or for tenants frequently arises with respect to trade fixtures. Trade fixtures are articles of personal property which a tenant places upon, or annexes to, leased real property for the purpose of carrying on a trade or business. Trade fixtures do not include items which are common to the maintenance and operation of structures in general, such as central air conditioning and heating systems or other plumbing. Trade fixtures which are affixed to real property may be removed by a tenant where removal would not cause substantial injury to the real property to which they are attached, except where there is a lease provision in effect prohibiting such removal (TSB-M-83[17]S, June 15, 1983).

As noted in Finding of Fact "9", most of the leases entered into by M & T Bank permitted or required the bank to remove its trade fixtures or bank equipment upon the expiration of the lease term. Accordingly, since this record contains no proof to rebut the presumption of nonpermanence created by these lease provisions which permitted or required M & T Bank to remove the ATM machines at the expiration of the lease, it is hereby determined that of the 52 ATM machines which were located in buildings which were leased by M & T Bank, none were intended to become a permanent installation except for: lease no. 27 (441 Greece Ridge Center Drive, Rochester, New York) which provided that upon the expiration of the lease, the fixtures or equipment became part of the real estate and the sole property of the landlord; lease no. 40 (Cortlandville Mall Rte. 13, Cortland, New York) which lease stated that the fixtures or equipment remained the property of the tenant for the term of the lease and then became property of the landlord upon expiration of the lease term; and lease no. 43, applicable to two ATM

machines (1304-1312 Niagara Falls Blvd., Tonawanda, New York) which provided that the fixtures and equipment became the property of the landlord at the expiration of the lease.

Since lease no. 36, applicable to two ATM machines (7300 Transit Road, Williamsville, New York) contained no language which addressed removal of fixtures or property installed by the tenant during the term of the lease, it is determined that, absent proof to the contrary, M & T Bank had the right to remove such fixtures or property. Lease no. 39 (2195 Harlem Road, Cheektowaga, New York) stated that the fixtures or equipment were to become the property of the landlord unless the landlord elected otherwise. The record contains no proof that the landlord of this property did not make such an election and, therefore, the presumption of nonpermanence has not been rebutted.

With respect to the 19 ATM machines which were located in buildings which were owned by M & T Bank, in order to ascertain whether their installation was intended to be permanent, it is necessary to look to the intent of the manufacturer of the ATMs, i.e., Diebold, as well as to the intent of M & T Bank. As petitioner correctly notes, “[t]he expression ‘permanent’ does not imply that the annexation must be intended to be perpetual, it being sufficient that it was contemplated that the article remain where fastened until worn out or superseded by another article more suitable to the purpose” (*Troncillito v. Farm Family Mutual Insurance Co.*, 393 NYS2d 159, 160, *affd* 63 AD2d 1042, *affd* 47 NY2d 736).

It is obvious from its marketing strategies and modular design that Diebold intended that its installations of ATM machines were to be permanent (*see*, Finding of Fact “8”). Because of declining sales of new ATM machines, Diebold focused much of its attention on technology to upgrade existing machines. By designing ATMs with plug-in modules, Diebold made it

considerably less expensive to upgrade an existing machine rather than replace it. In addition, upgrading permitted the original installation and ATM chest to remain intact.

As to the intent of M & T Bank regarding the permanence of its ATM installations, its Assistant Vice President of Electronic Banking, John Kackmann noted that removal of an ATM necessitates the repair of a hole in a wall and often causes new damage to the wall or surrounding structures. Sometimes, the wall surrounding the machine must be cut or broken through in order for it to be removed, thereby requiring additional wall repairs. M & T Bank rarely transfers or reuses an ATM machine after its original installation; a transfer of ATMs is most likely to occur when two branches are being consolidated. Although the record contains evidence of an occasional transfer or replacement of an ATM by M & T Bank, it is apparent that its intent was that installations of ATM machines were to be permanent.

G. The Division, as part of its argument that ATMs are not intended to be permanently installed, points out that ATM machines are plugged into an electric socket rather than hard wired into the building's electrical system. While that is currently true, many ATMs were formerly hard wired. Electric garage door openers and controls which the Division considers capital improvements (*see*, Publication 862, p.15) are sometimes hard wired, but are often designed to be plugged into an electrical outlet.

H. The Division further contends that the intent of M & T Bank can be ascertained by its treatment of the ATM machines in its books and records as fixed assets in a personal property account when it also maintains accounts for leasehold improvements and real property. In support of this contention, the Division relies on *Matter of Datascope Corporation* (Tax Appeals Tribunal, August 6, 1992), a case which involved the imposition of use tax on equipment used for demonstration purposes. In that case, the petitioner contended that such equipment should be

exempt from use tax because it was subsequently sold to customers at which time the equipment became subject to sales tax. The Tribunal held that in order to determine whether the equipment was subject to use tax, it was necessary to look to the nature of petitioner's use of the property at the time it was acquired. In this light, the Tribunal found it useful to consider petitioner's own treatment of the property in its books and records (the equipment was held in a fixed assets account). In *Matter of Datascope Corporation (supra)*, the categorization of the equipment was of particular relevance because it evidenced the taxpayer's intent to remove it from inventory available for sale and, upon so doing, the equipment became subject to use tax.

In the present matter, the manner in which a particular piece of equipment is carried on a taxpayer's books is not determinative of whether it qualifies as a capital improvement. Unlike in *Datascope*, the taxpayer's accounting practices do not trigger the imposition of tax.

It must also be noted that at the time that the audit was conducted, M & T Bank had yet to become aware that it might be entitled to a refund of sales tax paid upon the purchase and installation of the ATM machines. The refund claim was filed after a discussion with an employee of the Division who presumably alerted petitioner that such a claim might be warranted. In no manner can M & T Bank's accounting treatment of the ATM machines be found to be credible evidence of the bank's intent that its installations of these machines were not permanent.

I. Accordingly, based upon Conclusions of Law "D" through "H," it is hereby determined that the 19 ATM machines located in buildings owned by M & T Bank and four ATM machines located in buildings leased by M & T Bank (lease nos. 27, 40 and 43 [two ATM machines]) meet the criteria, as set forth in Tax Law § 1101(b)(9)(i), for qualification as capital improvements.

J. Tax Law § 1101(b)(6) imposes a tax upon “pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser.”

The Division contends that even if the ATM machines are determined to be capital improvements, the software component of petitioner’s purchases from Diebold is subject to sales tax. Diebold’s invoices to M & T Bank contain a charge for software as well as hardware (the ATM machine).

On May 30, 1985, the Division issued an advisory opinion (*Matter of Avant-Garde Computer Systems, Inc.*, TSB-A-85[23]S) which addressed this issue. An advisory opinion is a written statement issued on behalf of the Commissioner of Taxation and Finance regarding the application of the Tax Law to a specific set of facts. An advisory opinion is not binding on the Commissioner except with respect to the person to whom the opinion is issued (Tax Law § 171[24]). Although it has no precedential value, this advisory opinion contains analysis and reasoning which has relevance to this issue and it provides persuasive guidance.

This advisory opinion held that the sale of computer programs developed by the taxpayer for its ATM machines was an exempt sale of intangible personal property since the programs required an analysis of the customer’s requirements and modification of the actual program for use by that customer. That taxpayer, Avant-Garde Computer Systems, Inc., developed basic computer programs which were licensed primarily to financial institutions for use in the institutions’ ATMs. The opinion found that petitioner was required to analyze each licensee’s needs and requirements in order to ascertain the appropriate modifications to each licensee’s basic program. Such modifications included: (1) changes in screen; (2) changes in account type; (3) changes in transactions handled; (4) separate identification number for each institution; (5)

separate identification number for each ATM terminal; and (6) address/location for ATM terminal.

Curiously, petitioner has failed to address this issue in either its brief received June 12, 2002 or in its reply brief received September 3, 2002. However, while it is true that a sample invoice from Diebold to M & T Bank included a charge for software as part of the total cost of purchasing and installing an ATM machine, the record also contains a substantial amount of literature and brochures from Diebold which indicate that there were a number of options available to purchasers of its ATM machines, options which, as was the case in *Matter of Avant-Garde Computer Systems, Inc. (supra)*, required modifications performed by Diebold without which such options could not have been utilized by M & T Bank or any other financial institution which purchased the ATMs. These options include: various display options (such as monochrome, color, privacy screen and sunlight-viewable display), deposit options (such as envelope depository or Intelligent Depository Module which scans check image, recognizes courtesy amount, etc.), media dispenser options (currency or coin), security options (such as heat or thermo detection, duress alarm, digital electronic locks, etc.) and multimedia options (full motion video, audio or voice guidance).⁴

From an examination of the Diebold literature, it is clear that Diebold's computer programs utilized in its ATM machines required an analysis of its customer's requirements and a modification of the actual program for use by such customer. Accordingly, the sale of the computer programs, i.e., the software, was an exempt sale of intangible personal property.

⁴ These options were available on the Model 1064i walk-up ATM machine. These and other options were available on other models which M & T Bank purchased from Diebold.

K. Finally, citing to Division's Exhibit "G" (a memorandum of agreement between M & T Bank and Diebold for the purchase and installation of a Model 1072i walk-up ATM), the Division contends that Diebold's charges included protective services: non-Diebold camera interface, alarm network interface and seismic detectors. Tax Law § 1105(c)(8) imposes a tax on the receipts for protective and detective services and, unlike Tax Law § 1105(c)(3), does not contain an exclusion for such services performed in conjunction with installing a capital improvement. The Division states that the installation of security devices constitutes a protective service and the charge for the tangible personal property installed as part of a protective service is subject to sales tax. This is true, the Division maintains, even if the rest of the installation constitutes a capital improvement. As was the case with the issue raised by the Division with respect to the software component (*see*, Conclusion of Law "J"), petitioner has failed to address this issue in its brief or reply brief.

Interestingly, the memorandum of agreement (Exhibit "G"), entered into in September 1996, states that shipment is to be made to "Thruway Mall." The only other memorandum of agreement which is in evidence in this proceeding is contained within Division's Exhibit "B", as attachment "4" thereto. This memorandum of agreement, entered into in March 1997, indicates shipment is to be made to Tops Supermarket, 1900 Clinton Avenue, Brighton, New York. Neither of these locations is one of the properties owned or leased by M & T Bank which is the subject of this refund application.

While, clearly, charges are set forth on these two memoranda of agreement for protective services, i.e., alarm systems presumably to protect the ATM machines, there are no other such memoranda in evidence herein. Therefore, while the Division is correct that petitioner is not entitled to a refund of sales tax paid on those charges which specifically relate to protective

services (whether or not a specific purchase and installation of an ATM machine has been held to be a capital improvement), the record contains no evidence as to whether there were amounts charged by Diebold to M & T Bank for such protective services on those ATM purchases which are the subject of this proceeding. Since it cannot be determined if amounts were charged for protective services on the 71 ATM machines at issue herein, the Division's assertion that petitioner is not entitled to a refund of sales tax paid on that portion of the charge relating to protective services cannot be sustained.

L. The petition of Manufacturers and Traders Trust Company is granted to the extent indicated in Conclusion of Law "I"; the Division of Taxation is hereby directed to compute the amount of sales tax paid on the purchase and installation of these 23 ATM machines and to refund the tax, plus appropriate interest; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
May 22, 2003

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE